

Should the UK choose the 'Norway model', it would still be subject to the jurisdiction of a foreign court



Many commentators consider the EEA to be the best option for Brexit when it comes to financial services. However, access to the financial markets through the EEA Agreement would not come for free, argues Øyvind Bø. He writes that EFTA Court's judgments are one of the fundamental pillars of the EEA Agreement, in a similar manner that the European Court of Justice ensures the application and enforcement of EU law. Should the UK join the EEA (Norway model), it would still be subject to the jurisdiction of an international court, he explains.

On March 13, the LSE Brexit blog published [an article by Morten Kinander](#), in which he argues that the UK will not be able to negotiate better access to the financial services market than Norway and that it should be careful about ditching the EEA alternative. I agree with the main points of his analysis that access to the EU's financial markets is a matter of law and not politics. After the emergence of EU's financial supervisory system, it will be extremely difficult for the UK to gain passporting rights to the European financial markets without allowing supranational supervision. The Norway option is probably as good as it gets, and it gives Norway passporting rights and rights to participate in the relevant meetings of the [European system of financial supervision](#), (ESAs) although without voting rights.

However, I do not agree with all of Morten Kinander's claims about the advantages of the EEA model. If the UK opts for the EEA alternative, he claims that it will not be bound by the EFTA Court, because its decisions are advisory. This sounds appealing, but as a general statement, it is incorrect.

Like the European Court of Justice, the EFTA Court has jurisdiction in cases concerning its member states' compliance with their obligations under the EEA Agreement. If Norway fails to comply with its obligations under the EEA Agreement, the EFTA Surveillance Authority may bring an action against the government of Norway before the EFTA Court. Such cases are regularly brought, and every year the EFTA Court hands down several judgments concerning the EFTA States' failure to comply with their obligations under the EEA Agreement and secondary legislation.



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The binding effect of the EFTA Court's judgments is one of the fundamental pillars of the EEA Agreement, as it ensures the application and enforcement of EEA law in the EFTA States in a similar manner as the European Court of Justice ensures the application and enforcement of EU law in its member states. There is no doubt about the binding effect of these judgments, which is clearly set out in Article 33 of the Surveillance and Court Agreement. The EFTA Court has even handed down a judgment concerning Norway's failure to comply with its judgments (case E-4/16).

The EFTA States consider themselves bound by the judgments of the EFTA Court. Even though they may not succeed in complying with the judgments within the relevant deadline, it is unthinkable that an EFTA State would openly refuse to comply with the judgments of the EFTA Court. The fact that the EFTA Court cannot impose fines for non-compliance with its judgments is therefore of less importance.

In certain fields, there are special rules about the EFTA Court's jurisdiction. In the field of competition, for example, the judgments from the EFTA Court have an immediate effect in the national legal systems of the EFTA States, and the EFTA Court has powers of judicial review in the field of financial services.

In addition to its judgments, the EFTA Court hands down advisory opinions, which correspond to the preliminary rulings of the Court of Justice. These opinions are not binding. Although important, the significance of the non-binding nature of these decisions should not be exaggerated.

If the States do not comply with the interpretation of EEA law set out in the advisory opinions, the EFTA Surveillance Authority may bring an action against them in the EFTA Court for failure to comply with the rules interpreted in the opinions. When, in turn, the EFTA Court decides whether or not the States have complied with their obligations, it would be no surprise if it decides to apply the interpretation expressed in its advisory opinion. Arguably, the EFTA States are therefore indirectly bound to apply the interpretation expressed in the advisory opinions of the EFTA Court.

More importantly, national courts in the EFTA States are not obliged to apply the EFTA Court's advisory opinions. Nevertheless, this has a very limited impact on the overall enforcement of EEA law in the EFTA States. Firstly, national courts in the EFTA States are obliged to enforce EEA law, just like their counterparts in the EU Member States must enforce EU law. Secondly, the vast majority of cases litigated before national courts are decided upon without the involvement of the courts in Luxembourg. Thus, the practical importance of the advisory nature of the EFTA Court's opinions is more limited than it would seem.

Highlighting the non-binding nature of the advisory opinions from the EFTA Court without explaining the context exaggerates the differences between the respective roles of the European Court of Justice and the EFTA Court. The fact that the advisory opinions are not binding does not imply that the UK in the EEA would not need to be subject to the jurisdiction of an international court.

Morten Kinander also addresses the set-up of the financial supervisory authorities (ESAs) in the EEA Agreement. In that set-up, the EFTA States are subject to the supervision of the ESAs as a matter of fact. However, he argues that the EFTA States are not subject to the supervision of the ESAs as a matter of formality because the EFTA Surveillance Authority is under no legal duty to adopt the decisions drafted by the ESAs. I think the latter issue is debatable.

Annex IX to the EEA Agreement states that whenever the ESAs issue draft decisions to the EFTA Surveillance Authority, the latter "shall, without undue delay" adopt the relevant decision. The wording clearly suggests that the EFTA Surveillance Authority is under a legal duty to adopt a decision whenever the ESAs issue a draft. Arguably, the role of the EFTA Surveillance Authority is to adapt the draft, which has been drafted within the framework of the EU, to the framework of the EEA Agreement, and not to reconsider the underlying substance of the decision.

As Morten Kinander explains, this question is of constitutional significance in Norway, but it is also of limited practical interest, as the EFTA Surveillance Authority will most likely adopt any decision proposed by the ESAs.

This post represents the views of the author and not those of the Brexit blog, nor the LSE.

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